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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DARIUS MOSTOWFI, TENG LEW LIM, No C 03-5784 VRW  
FUNG CHEE LIM and TENG HOWE LIM,

ORDER

Plaintiffs,

v

I2 TELECOM INTERNATIONAL, INC,  
PAUL R ARENA, BERNARD R KOSSAR,  
ANTHONY F ZALENSKI, ALEX OPRESCU  
RON ROSWELL, SR, JON ROBERTS and  
ROBERTS, ABOKHAIR & MARDULA, LLP,

Defendant.

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This case arises from defendants' allegedly unlawful orchestration of a scheme to deprive plaintiffs of control over their company and their intellectual property. There are two groups of defendants: (1) defendants allegedly affiliated with the company I2 Telecom International, Inc (I2 Telecom itself, Paul Arena, Bernard Kossar, Anthony Zalenski, Alex Opreescu and Ron Roswell (collectively, "I2 Telecom defendants")) and (2) I2 Telecom's attorneys (Jon Roberts and the law firm Roberts, Abokhair

1 & Mardula LLP (collectively, the "attorney defendants")).

2 Before the court are I2 Telecom defendants' motion to  
3 dismiss the first amended complaint ("FAC") pursuant to FRCP  
4 12(b)(6) and 9(b) (Doc #60) and attorney defendants' motion to  
5 dismiss the FAC pursuant to FRCP 12(b)(6) and 9(b) (Doc #65). For  
6 the following reasons, the court GRANTS attorney defendants' motion  
7 to dismiss and GRANTS IN PART I2 Telecom defendants' motion to  
8 dismiss.

10 I

11 A

12 "On a motion to dismiss, all well-pleaded allegations of  
13 material fact are taken as true and construed in a light most  
14 favorable to the non-moving party." Wyler Summit Partnership v  
15 Turner Broadcasting Systems, Inc, 135 F3d 658, 661 (9th Cir 1998)  
16 (citing Parks School of Business, Inc v Symington, 51 F3d 1480,  
17 1484 (9th Cir 1995)). Accordingly, what follows is drawn from the  
18 FAC, taking its allegations as true. The causes of action in this  
19 case, while premised on a lengthy and complex set of allegations,  
20 are all essentially based on plaintiffs' contention that defendants  
21 orchestrated a scheme to trick plaintiffs into relinquishing  
22 control over the company Supercaller Community, Inc  
23 ("Supercaller"), as well as control over various intellectual  
24 property rights. See FAC (Doc #49) at 2 ¶ 1. Plaintiff Darius  
25 Mostowfi ("Mostowfi"), a California resident, is an electrical  
26 engineer and designer of telecommunication hardware. Id at 7-8 ¶¶  
27 23, 28. Plaintiff Teng Lew Lim ("Lim") is a Malaysian citizen  
28 residing in California and is an entrepreneur. Id. In early 2001,

1 Mostowfi and Lim collaborated to mass-produce Mostowfi's "VOIP"  
2 technology, which allows voice telecommunication calls to be routed  
3 over the Internet. Id at 8 ¶ 29. Lim incorporated Supercaller for  
4 this purpose and invested his own money into development of the  
5 product. Id at 9 ¶ 30. Plaintiffs Fung Chee Lim and Teng Howe  
6 Lim, Lew Lim's uncle and brother, also invested in Supercaller.  
7 Id. The Lims collectively owned about 90% of Supercaller's  
8 outstanding shares, while Mostowfi owned the remaining 10%. Id.  
9 Lim became Supercaller's CEO, while Mostowfi assumed the role of  
10 CTO. Id.

11 Defendants acted in concert with one another to usurp  
12 control over both Supercaller itself and the intellectual property  
13 right for Supercaller's VOIP technology. Id at 2 ¶ 2. According  
14 to the complaint, defendants Arena, Kossar and Zalenski created a  
15 sham enterprise for the purposes of accomplishing this fraud. Id  
16 at 3 ¶¶ 4-8. That enterprise is defendant I2 Telecom, a Delaware  
17 corporation that allegedly operated with inadequate capital and  
18 falsely purported to provide telecommunications services using VOIP  
19 technology. Id at 2 ¶ 3.

20 Plaintiffs allege that in June 2002, I2 Telecom entered  
21 into a Common Stock Purchase Agreement ("CSPA") to invest in  
22 Supercaller's VOIP technology. Id at 12 ¶ 46. Pursuant to this  
23 agreement, I2 Telecom agreed to pay \$1,300,000 to purchase 20% of  
24 Supercaller's shares. Id. The agreement also provided that I2  
25 Telecom defendants would receive one seat on Supercaller's Board of  
26 Directors. Doc #49, Ex A within Ex I. Defendant Arena filled that  
27 seat, but I2 Telecom never paid the amount agreed upon. Doc #49 at  
28 13 ¶ 47. (It is not clear from the complaint how much money, if

1 any, defendants actually paid.) Moreover, I2 Telecom further  
2 entered into a Development and Licensing Agreement ("DLA") which  
3 called for I2 Telecom to invest a substantial sum in promoting and  
4 marketing Supercaller's products. Id at 12-13 ¶ 46. In entering  
5 these agreements, the I2 Telecom defendants misrepresented their  
6 ability and intentions to consummate the transaction and relied on  
7 defendant Roberts (an attorney) and defendant law firm Roberts,  
8 Abokhair & Mardula LLP (RAM LLP) to further their  
9 misrepresentations. Id at 4 ¶ 4. Defendants' actions induced  
10 Supercaller to expend its cash reserves in reliance on the receipt  
11 of nonexistent funds from I2 Telecom. Id at 4 ¶ 10.

12         Thereafter, the I2 Telecom defendants wrongfully obtained  
13 control of Supercaller by forcing the resignation of Lim and  
14 Mostowfi. On September 16, 2002, the I2 Telecom defendants called  
15 a Supercaller board meeting, falsely accused Lim of accounting  
16 fraud, threatened him with criminal prosecution and deportation and  
17 forced him to resign. Id at 4-5 ¶¶ 11-14. Then, using unlawful  
18 board resolutions, the I2 Telecom defendants forced Lim to merge  
19 Supercaller into I2 Telecom in return for no consideration. Id at  
20 5 ¶ 14. As a result of this sham merger, the I2 Telecom defendants  
21 became the owners of Supercaller. Id at 5-6 ¶ 16.

22         Next, the I2 Telecom defendants "systematically removed"  
23 Mostowfi from Supercaller by wrongfully threatening to terminate  
24 his employment, prompting his resignation. Id at 5 ¶ 17.  
25 Defendants then collaborated with Roberts and RAM LLP to acquire  
26 the rights to Mostowfi's intellectual property by threatening  
27 Mostowfi with baseless lawsuits if he did not assign his rights in  
28 the VOIP technology to the I2 Telecom defendants without any

1 compensation. Id. Mostowfi then signed over his rights in a  
2 provisional patent application he had filed. Id.

3           Plaintiffs filed the original complaint in this action on  
4 December 22, 2003, alleging twenty-two different causes of action:  
5 (1) declaratory judgment under Cal Corp Code § 709; (2) fraud and  
6 deceit (misrepresentation and concealment); (3) fraud and deceit  
7 (false promise); (4) racketeering conspiracy; (5) substantive  
8 racketeering; (6) trespass to chattels; (7) unjust  
9 enrichment/restitution; (8) civil conspiracy; (9) interference with  
10 prospective economic advantage; (10) breach of duty of good faith  
11 and fair dealing; (11) defamation; (12) breach of fiduciary duty,  
12 duty of loyalty and duty against self-dealing by defendant Arena;  
13 (13) usurpation of corporate opportunity; (14) breach of fiduciary  
14 duty, duty of loyalty and duty against self-dealing by the attorney  
15 defendants; (15) tortious interference with attorney-client  
16 relationship; (16) breach of contract; (17) conversion; (18)  
17 infliction of emotional distress; (19) wrongful discharge; (20)  
18 professional negligence - legal malpractice; (21) accounting; and  
19 (22) constructive trust. Doc #1.

20           Attorney defendants moved to dismiss the claims against  
21 them pursuant to FRCP 12(b)(6) and 9(b). Doc #17. Plaintiffs  
22 named the attorney defendants as defendants in seventeen of the  
23 twenty-two causes of action (all claims except those for  
24 defamation, breach of duty by Arena, usurpation of corporate  
25 opportunity, breach of contract and wrongful discharge). Doc #1.  
26 Attorney defendants argued that plaintiffs' claims were based on  
27 allegations of fraud and that those allegations were not pled with  
28 the requisite particularity mandated by FRCP 9(b). Doc #17 at 8-9.

1 By order dated May 27, 2004, the court granted attorney  
2 defendants' motion to dismiss. Doc #37. Noting that the  
3 requirements of FRCP 9(b) apply to all of plaintiffs' claims  
4 against the attorney defendants, the court was unable to identify  
5 any specific statements made by the attorney defendants that  
6 satisfied Rule 9(b)'s heightened pleading standards. Rather, the  
7 court found plaintiffs' allegations to be too general and  
8 insufficient to support the claims of fraud against the attorney  
9 defendants. Accordingly, the court dismissed the claims against  
10 attorney defendants, but granted plaintiffs leave to amend their  
11 complaint to: (1) plead fraud against the attorney defendants with  
12 the requisite degree of specificity; or (2) replead any of the  
13 claims that do not require fraud as an essential element, if  
14 plaintiffs are able to assert a non-fraud basis for any of those  
15 claims. Id.

16 In addition to attorney defendants' motion to dismiss,  
17 the I2 Telecom defendants also moved the court to dismiss  
18 plaintiffs' complaint pursuant to FRCP 12(b)(6). Doc #8. Noting  
19 that the I2 Telecom defendants failed to demonstrate what essential  
20 elements were missing from the complaint, the court denied their  
21 motion. Doc #37.

22  
23 B

24 On July 20, 2004, plaintiffs filed the FAC, adding eleven  
25 pages to the original complaint's sixty-eight pages. Doc #49.  
26 Although the FAC contains the same twenty-two causes of action as  
27 the original complaint, plaintiffs have added eleven new paragraphs  
28 below original paragraph seventy-five in an effort to plead their

1 allegations of fraud against attorney defendants with sufficient  
2 particularity. Id at 21-28 ¶¶ 75a-75m. The gravamen of  
3 plaintiffs' claim against attorney defendants appears to be the  
4 following: By making fraudulent statements and omissions, attorney  
5 defendants deceived plaintiffs into believing: (1) that I2 Telecom  
6 was a legitimate business and (2) that attorney defendants were not  
7 secretly working for the benefit of I2 Telecom defendants. As a  
8 result of those fraudulent statements and omissions, plaintiffs  
9 disclosed confidential information to attorney defendants (which  
10 attorney defendants then disclosed to I2 Telecom defendants). Id  
11 at 4 ¶ 9. Plaintiffs allege that but for the misrepresentations,  
12 they would never have entered into the CSPA or DLA with I2 Telecom  
13 defendants. The court will examine plaintiffs' allegations in  
14 greater detail shortly.

15 Now before the court is attorney defendants' second  
16 motion to dismiss claims 1-10, 14, 15, 17, 18 and 20-22 of the FAC  
17 (all causes of action directed against attorney defendants). Doc  
18 #65. First, attorney defendants argue that plaintiffs' FAC still  
19 fails to satisfy FRCP 9(b)'s particularity requirements. Id at 11.  
20 Next, attorney defendants contend that beyond the alleged fraud  
21 defects, plaintiffs have not adequately pled the elements of a RICO  
22 claim. Id at 14. Also before the court is I2 Telecom defendants'  
23 second motion to dismiss claims 2-5, 8-10, 13, 15, 18 and 19 of the  
24 FAC. Doc #60.

## 25 II

26  
27 As a preliminary matter, the court addresses plaintiffs'  
28 contention that defendants cannot file a motion to dismiss on

1 grounds separate from those they filed in a first Rule 12 motion.  
2 Doc #96 at 2. At bottom, plaintiff argues that because the grounds  
3 for certain objections were available to defendants at the time the  
4 previous motions to dismiss were filed, defendants should not now  
5 be allowed to raise new objections. For several reasons however,  
6 plaintiffs' argument is without merit.

7 FRCP 12(b)(6) provides that a defense of failure to state  
8 a claim upon which relief can be granted may be made by motion  
9 before filing a responsive pleading to the complaint. FRCP 12(g)  
10 requires a defendant to include all defenses and objections  
11 permitted under Rule 12 in the same motion. If defendant fails to  
12 do so, the omitted defense or objection shall be waived. FRCP  
13 12(h)(2) provides that a 12(b)(6) defense may be made in any  
14 pleading permitted under FRCP 7(a), or by motion for judgment on  
15 the pleadings, or at the trial on the merits.

16 "The philosophy underlying [Rule 12(g)] is simple and  
17 basic: a series of motions should not be permitted because that  
18 results in delay and encourages dilatory tactics." Aetna Life Ins  
19 Co v Alla Medical Services, Inc, 855 F2d 1470, 1475, n2 (9th Cir  
20 1988). "[I]t is a waste of judicial resources to consider motion  
21 after motion in which defendants raise the same defense over and  
22 over, each time testing a new argument." Sprint Telephony PCS, L P  
23 v County of San Diego, 311 F Supp 2d 898, 908 (SD Cal 2004).

24 Defendants' motions to dismiss do not implicate the  
25 policy underlying Rule 12(g). First, plaintiffs have alleged  
26 twenty-two causes of action in their seventy-nine page complaint  
27 (excluding exhibits). To the extent this case has suffered delay,  
28 it is a result of plaintiffs' unnecessarily long and disorganized



1 complaint. Second, as Rule 12(h)(2) makes clear, a defense of  
2 failure to state a claim upon which relief can be granted may be  
3 raised at several stages; as such, the court will ultimately have  
4 to pass on the current round of motions to dismiss. This case will  
5 be most efficiently and expeditiously resolved if the court  
6 entertains defendants' motions to dismiss at this stage of  
7 litigation. To the extent that a motion to dismiss for failure to  
8 meet Rule 9(b)'s heightened pleading standard may only be raised  
9 while the pleadings are open, defendants still have the better of  
10 the argument as the salutary purposes of Rule 9(b) - fair notice  
11 and appropriately focused litigation - outweigh the efficiency  
12 rationale behind Rule 12(g) in this case.

13 Plaintiffs argue that this court ruled in its May 27,  
14 2004, order that I2 Telecom defendants waived any objections to the  
15 RICO causes of action because they failed to raise them in the  
16 first Rule 12 motion "and rather attempted to raise those issues in  
17 the reply for the first time." Doc #96 at 2. But the court merely  
18 held that it would not consider arguments raised for the first time  
19 in a reply brief, as doing so would unfairly deprive plaintiffs of  
20 their opportunity to respond. In this case, defendants present  
21 their arguments in motions to dismiss, rather than in reply to  
22 plaintiffs' opposition memorandum. Plaintiffs therefore have had  
23 an opportunity to respond.

24 Accordingly, in the interests of efficiency and fairness,  
25 the court will address all issues raised in defendants' motions to  
26 dismiss.

27 /

28 /

## III

The court first addresses attorney defendants' motion.

## A

As the court has already indicated, plaintiffs have amended the original complaint in an effort to satisfy FRCP 9(b)'s heightened pleading requirements. Plaintiffs have added several pages of material in an effort to state specific fraudulent statements and omissions. While plaintiffs' allegations of fraud against attorney defendants are many, they boil down to two charges: But for attorney defendants' failure to disclose a conflict of interest, plaintiffs would not have (1) communicated confidential trade secrets to attorney defendants or (2) entered into the CSPA and DLA with I2 Telecom defendants. Doc #49 at 26-27 ¶ 75h. Despite plaintiffs' amendment, attorney defendants argue that the FAC still fails to comply with FRCP 9(b)'s heightened pleading standards.

Rule 9(b) provides:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

"Rule 9(b) demands that, when averments of fraud are made, the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct \* \* \* so that they can defend against the charge and not just deny that they have done anything wrong." Vess v Ciba-Geigy Corp USA, 317 F3d 1097, 1106 (9th Cir 2003) (internal quotations and citations omitted). Allegations of fraud "must be accompanied by 'the who, what, when,

1 where, and how' of the misconduct charged." Id (citing Cooper v  
2 Pickett, 137 F3d 616, 627 (9th Cir 1997)). Additionally, the  
3 allegations must include more than the neutral facts necessary to  
4 identify the transaction - the allegations must also set forth what  
5 is false and misleading about the statement and demonstrate why the  
6 statement is false. Vess, 317 F3d at 1106; In re GlenFed, Inc  
7 Securities Litigation, 42 F3d 1541, 1548 (9th Cir 1994). Rule 9(b)  
8 thus demands much more than mere "notice pleading," as is required  
9 under Rule 8(a). GlenFed, 42 F3d at 1547.

10 Rule 9(b)'s heightened pleading standard applies not only  
11 to claims in which fraud is an essential element, but also to any  
12 claim for which the plaintiff has relied entirely on "a unified  
13 course of fraudulent conduct" as its basis. Vess, 317 F3d at 1103.  
14 In that event, the claim can be said to be "grounded in fraud" or  
15 to "sound in fraud," and the pleading of the claim as a whole must  
16 meet the Rule 9(b) standard. Id at 1103-04. As is the case with a  
17 Rule 12(b)(6) motion, the court may dismiss a claim for fraud (or  
18 one grounded in fraud) if the complaint or claim fails to comply  
19 with the pleading standard set forth in Rule 9(b). Id at 1107.

20 As mentioned above, plaintiffs' FAC contains the same  
21 twenty-two causes of action as the original complaint.  
22 Accordingly, Rule 9(b) applies with equal force to all causes of  
23 action in the amended complaint, regardless of whether fraud is an  
24 essential element or the claim is merely grounded in fraud. See  
25 Doc #37 at 24-25. Moreover, Rule 9(b) applies to both fraudulent  
26 statements and omissions. See In re Stac Electronics Securities  
27 Litigation, 89 F3d 1399, 1404 (9th Cir 1996) (explaining that Rule  
28 9(b) requires an explanation as to why the statement or omission

1 complained of was false or misleading). Because statements and  
2 omissions require a somewhat different analysis, the court will  
3 first analyze whether any allegations of false statements in the  
4 FAC satisfy Rule 9(b). Next, the court will determine whether  
5 plaintiffs have alleged any omissions in conformance with Rule  
6 9(b). In this inquiry, the court seeks to identify: (1) a  
7 specific statement or omission made to plaintiffs by any of the  
8 attorney defendants that was false or misleading; (2) the time and  
9 place of such a statement; and (3) allegations describing why that  
10 statement was false.

## B

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12  
13 The court has reviewed the FAC in search of any purported  
14 statement that could conceivably satisfy Rule 9(b). First,  
15 plaintiffs allege that attorney defendants "falsely stated to  
16 [plaintiffs] that RAM-LLP would perform a better job at drafting  
17 SuperCaller's and Mostowfi's patent applications." Id at 22. This  
18 statement fails to meet 9(b)'s standards for several reasons.  
19 First, plaintiffs have not identified when or where the statement  
20 was made. Next, the description is vague and provides little  
21 detail about the contents of those statements. Finally, plaintiffs  
22 have failed to explain why the statement was false. In order to  
23 know whether attorney defendants did a better or worse job than  
24 plaintiffs' previous counsel, plaintiffs must allege the level of  
25 performance their other counsel would have met. Those allegations  
26 have not been made.

27 Most important, according to plaintiffs, is the fact that  
28 attorney defendants' invoices from September 6 through September

1 20, 2002, demonstrate that attorney defendants "secretly  
2 communicated [plaintiff's confidential information] to [I2 Telecom  
3 defendants]" and "used that confidential and privileged information  
4 to the advantage of [I2 Telecom defendants.]" Id at 23-25. The  
5 court is unable to locate any statement in the invoice or elsewhere  
6 showing that attorney defendants communicated any confidential  
7 information to I2 Telecom defendants. Nowhere in the invoice have  
8 attorney defendants demarcated acts of secret communication or  
9 misappropriation of plaintiffs' confidential information.  
10 Allegations of fraud must set forth what is false and misleading  
11 about the statement and demonstrate why the statement is false.  
12 Plaintiffs have failed to make that showing. It is simply not  
13 sufficient for plaintiffs to reprint a bill and tell defendants (or  
14 the court) to find the fraudulent misrepresentations. In short,  
15 plaintiffs have not explained to the court how it is that the  
16 invoice evidences a false representation.

17           Next, plaintiffs allege that attorney defendants' "active  
18 endorsement that I2 Telecom was a legitimate telecommunications  
19 company" caused plaintiffs to enter into the CSPA and DLA. Id at  
20 27. Again, plaintiffs have failed to specify when and where any  
21 "active endorsements" were made and why they were false. Moreover,  
22 alleging an "active endorsement" hardly approaches the demanding  
23 requirement of a specific statement. Accordingly, this allegation  
24 is insufficient under Rule 9(b).

25           Next, plaintiffs allege that attorney defendants  
26 "counseled I2 Telecom and its officers to threaten Mostowfi and  
27 force him with unwarranted threats of bankrupting his family with  
28 the sole aim to have Mostowfi assign his inventions to SuperCaller

1 \* \* \*." Id at 27. This is a very serious charge. But once again,  
2 the court is unable to determine when and where attorney defendants  
3 offered such advice and how it misled anyone. Moreover, to the  
4 extent defendants may have misrepresented the law to Mostowfi (i e,  
5 deceiving him into wrongly believing that his family could be  
6 bankrupted by virtue of his alleged misconduct), "fraud cannot be  
7 predicated upon misrepresentations of law or misrepresentations as  
8 to matters of law." Miller v Yokohama Tire Corp, 358 F3d 616 (9th  
9 Cir 2004) (internal citations omitted). And to the extent  
10 defendants may have misrepresented fact in stating their intention  
11 to bankrupt Mostowfi's family, plaintiffs have not alleged that  
12 defendants did not intend to do so. Accordingly, this alleged  
13 statement is without merit.

14 Next, plaintiffs allege that attorney defendants  
15 "promised to prepare each [of plaintiffs' patent applications] for  
16 only \$2000. But this promise was false." Id at 27. Plaintiffs  
17 also allege that attorney defendants "promised to prepare and file  
18 SuperCaller's patent applications faster than SuperCaller's then  
19 patent counsel, but this was a false promise because not only did  
20 Roberts fail to file patent applications timely, he knowingly  
21 allowed a provisional patent application to be expired." Id at 28.

22 To begin with, plaintiffs' statement that attorney  
23 defendants promised to prepare patent applications for \$2,000 each  
24 "was false" does not tell the court why the statement was false.  
25 The issue is not whether attorney defendants in fact prepared the  
26 patent applications faster or slower than Chaganti would have. The  
27 issue is whether attorney defendants' promise to prepare the patent  
28 applications faster than Chaganti was false when made. Moreover,

1 in order to allege promissory fraud, plaintiffs must plead facts  
2 generally averring that attorney defendants intended not to be  
3 bound by their promise at the time the promise was made. Hsu v OZ  
4 Optics Ltd, 211 FRD 615, 620 (ND Cal 2002). Plaintiffs have not  
5 alleged that attorney defendants harbored an intent to file  
6 Supercaller's patent applications at a slower pace than  
7 Supercaller's prior patent counsel at the time of the promise.  
8 Plaintiffs have alleged that attorney defendants ultimately did not  
9 fulfill their promises regarding patent applications. But that  
10 fact is not sufficiently probative on the question of attorney  
11 defendants' intent at the time of the promise. Nor does it  
12 necessarily foreclose the possibility that attorney defendants  
13 meant what they said at the time of the promise. While it is true  
14 that intent may be averred generally, plaintiffs have not even done  
15 that. Accordingly, these allegations do not satisfy Rule 9(b)'s  
16 requirements.

17 Finally, plaintiffs allege that attorney defendants  
18 "promised [plaintiffs] that [attorney defendants] would act in the  
19 interests of the inventor Mostowfi." Id at 28. However,  
20 plaintiffs have not told the court when and where this promise was  
21 made, or why it was false (aside from stating that the attorney  
22 defendants' invoice somehow shows it was false). Moreover, the  
23 alleged statement is vague, and provides insufficient detail as to  
24 the nature of the promise. It does not meet the Rule 9(b)  
25 standard.

26  
27 C

28 The court now turns to plaintiffs' allegations that

1 attorney defendants made fraudulent omissions. In the original  
2 complaint, plaintiffs made few allegations regarding the conduct of  
3 attorney defendants. Rather, plaintiffs merely proffered vague  
4 allegations that attorney defendants knew or should have known that  
5 I2 Telecom defendants were defrauding plaintiffs out of their  
6 intellectual property. Doc #49 at 4 ¶ 9. Moreover, plaintiffs  
7 offered the amorphous claim that RAM-LLP "lent an air of  
8 legitimacy" to I2 Telecom defendants' "sham investment operation."  
9 Id.

10 The court understands the greater difficulty in pleading  
11 fraud by omission (as compared to fraudulent statements).  
12 Plaintiffs must identify specific omissions on the part of  
13 defendants, explain when and where those omissions occurred and why  
14 they were misleading. But unlike a specific statement, a  
15 fraudulent omission can occur over a continuous period of time  
16 rather than a fixed point. Consequently, it may not be possible  
17 for plaintiffs to allege more than attorney defendants' failure to  
18 bring certain material information to plaintiffs' attention  
19 throughout their entire course of business dealings. The court is  
20 mindful of that difficulty in its assessment of attorney  
21 defendants' alleged omissions. Nonetheless, plaintiffs fail to  
22 plead misleading omissions with the requisite particularity.

23 The FAC alleges that attorney defendants represented that  
24 they were working on behalf of Supercaller when in reality,  
25 attorney defendants were working in the interests of I2 Telecom  
26 defendants. Id at 21-28 ¶¶ 75a-75m. In amending their complaint,  
27 plaintiffs have provided specific examples of the content of  
28 attorney defendants' alleged fraudulent omissions. First,



1 plaintiffs allege that attorney defendant Roberts and I2 Telecom  
2 defendant Zalenski were close friends, and that attorney defendants  
3 failed to state that fact in a telephone conference call on June  
4 26, 2002. Id at 21 ¶ 75a. Next, plaintiffs allege that, during  
5 the same conference call, Roberts failed to tell plaintiffs that he  
6 was working on behalf of I2 Telecom defendants. Id. Therefore,  
7 according to plaintiffs, Roberts had a conflict of interest and  
8 failed to disclose it to plaintiffs on June 26, 2002. Had attorney  
9 defendants not omitted to state those facts to plaintiffs,  
10 plaintiffs would not have disclosed confidential trade secrets to  
11 them. Id at 26 ¶ 75h. Moreover, the failure to state those facts  
12 contributed to plaintiffs' belief that attorney defendants were  
13 working in the best interests of Supercaller, rather than I2  
14 Telecom. Id at 22 ¶ 75c.

15 Plaintiffs did not agree to transfer patent application  
16 work to attorney defendants until July 12, 2002. Id at 27 ¶ 75j.  
17 Nor have plaintiffs alleged that they disclosed any confidential  
18 information to attorney defendants prior to the transfer of patent  
19 application work. Therefore, if plaintiffs were already aware of  
20 the conflict of interest on or before July 12, 2002 when they  
21 decided to transfer the work, then attorney defendants' omissions  
22 could not have misled plaintiffs when they decided to transfer the  
23 patent application work to attorney defendants. To the contrary,  
24 any statement by attorney defendants that there was a conflict of  
25 interest would merely have confirmed what plaintiffs already knew.

26 Plaintiffs allege that on or about July 12, 2002, in a  
27 telephone call, Supercaller's "then patent counsel advised  
28 [attorney defendants] that there was a conflict of interest if

1 Roberts represented both I2 Telecom and Supercaller \* \* \*." Id  
2 (emphasis added). Then, "facing the threat of lack of operating  
3 funds, SuperCaller discharged its patent counsel and under pressure  
4 from [I2 Telecom defendants], turned over the patent work to  
5 Roberts." Id. These allegations suggest that plaintiffs were  
6 already aware of attorney defendants' alleged conflict of interest  
7 before they decided to transfer the patent application work to  
8 attorney defendants. Plaintiffs have not alleged whether they  
9 believed there was a conflict of interest at the time they decided  
10 to turn over the work to Roberts. The FAC suggests that the facts  
11 are to the contrary and that plaintiffs decided to turn the work  
12 over to Roberts in spite of a perceived conflict of interest in  
13 response to I2 Telecom defendants' alleged threats to withhold  
14 operating funds. Accordingly, plaintiffs have not alleged  
15 sufficient facts to show that the omissions misled them into  
16 disclosing confidential information to attorney defendants.  
17 Although the court might appear to be picking at small details,  
18 these concerns illustrate the necessity of pleading fraud with  
19 particularity, particularly pleading when defendants made alleged  
20 statements.

21 Finally, plaintiffs allege that "but for the implication  
22 by silence and active endorsement [by attorney defendants] that I2  
23 Telecom was a legitimate telecommunications company \* \* \* neither  
24 SuperCaller, nor Mostowfi nor [] Lim would have entered into a  
25 technology licensing and investment agreement[] with \* \* \* [I2  
26 Telecom defendants] under the CSPA and the DLA." Doc #49 at 26-7 ¶  
27 75h. First, this alleged omission is fairly amorphous - just what  
28 should the attorney defendants have said to plaintiffs? Moreover,

1 all of plaintiffs' allegations concerning attorney defendants'  
2 statements and omissions relate to June 26, 2002, or later. And  
3 yet plaintiffs signed the CSPA and DLA on June 6, 2002. See Doc  
4 #62 Ex A,B. The court is at a loss to understand how plaintiffs  
5 could have signed the CSPA and DLA in reliance on statements and  
6 omissions yet to be made.

7 In sum, the court finds that plaintiffs have failed to  
8 allege facts with sufficient particularity to sustain the causes of  
9 action against attorney defendants. Accordingly, the court GRANTS  
10 the attorney defendants' motion to dismiss.

11  
12 D

13 Attorney defendants further challenge the FAC on the  
14 ground that plaintiffs have not alleged the elements of a RICO  
15 claim. Doc #65 at 14. Specifically, attorney defendants argue  
16 that plaintiffs have not alleged a "pattern" of conduct, which is  
17 an element of a RICO violation. Id. Because the court concludes  
18 that the entirety of the complaint must be dismissed as to attorney  
19 defendants pursuant to Rule 9(b), it declines to pass on whether  
20 the allegations (if they had been properly pled under Rule 9(b))  
21 would be sufficient to establish a RICO "pattern" of conduct.

22  
23 IV

24 The court now turns to I2 Telecom defendants' motion to  
25 dismiss.

26  
27 A

28 The court first addresses I2 Telecom defendants'

1 arguments based on Rule 9(b) .

3 1

4 First, I2 Telecom defendants argue that plaintiffs'  
5 second, third and eighth claims for fraud and deceit do not meet  
6 FRCP 9(b)'s heightened pleading requirements and should be  
7 dismissed. Doc #60 at 4. The same standards of heightened  
8 pleading already set forth govern the present analysis. Because  
9 all three causes of action incorporate the allegations in the  
10 general fact portion of the complaint, the court begins its  
11 analysis there.

13 a

14 With respect to general allegations, plaintiffs first  
15 allege that I2 Telecom defendants made several fraudulent promises.  
16 As already set forth, plaintiffs must allege that I2 Telecom  
17 defendants intended not to be bound by their promise at the time  
18 the promise was made. Plaintiffs allege that defendants "induced  
19 reliance on the part of Supercaller on their promise of capital  
20 infusion." Doc #49 at 4 ¶ 10. Next, I2 Telecom defendant Arena  
21 promised plaintiffs that he "would immediately bring investments of  
22 \$5,000,000 of his own money." Id at 10 ¶ 37. Arena and Zalenski  
23 "further promised [plaintiffs] that [I2 Telecom] would provide  
24 \$20,000,000 in subsequent venture funding from its shareholders.  
25 Id at 11 ¶ 38. "To induce reliance on the part of [plaintiffs],  
26 [I2 Telecom defendants] promised that they would provide a back-end  
27 server system for terminating telephone calls \* \* \*; that they had  
28 an agreement with Macro Communications \* \* \*. Arena represented

1 that Macro would provide the technology to terminate Supercaller-  
2 originated calls \* \* \*, but Macro never delivered what Arena  
3 promised that they would deliver." Id at 13 ¶ 48. "In August 5,  
4 2002, I2 Telecom promised to support Supercaller's development of a  
5 telecom router, but provided neither money nor technical  
6 resources." Id at 13-14 ¶ 50. In all but the promise on August 5,  
7 plaintiffs have failed to allege when the statement was made.  
8 Moreover, in every allegation, plaintiffs have failed to specify  
9 where or how it was made.

10 Next, plaintiffs allege non-promissory fraud in the  
11 general body of the FAC as well. First, plaintiffs allege that I2  
12 Telecom defendants falsely accused them of accounting fraud on  
13 September 16, 2002. Id at 4 ¶ 12. But such an accusation has  
14 nothing to do with misleading plaintiffs. Rather, false  
15 allegations of accounting fraud would go to misleading whatever  
16 authorities I2 Telecom defendants reported the fraud to. To say  
17 that attorney defendants deceived plaintiffs into believing that  
18 plaintiffs themselves committed accounting fraud does not admit to  
19 rational interpretation. Moreover, as discussed above, fraud  
20 cannot be predicated upon misrepresentations of law. Miller, 358  
21 F3d at 620.

22 Next, plaintiffs allege that the "'merger' [between  
23 Supercaller and I2 Telecom] was a trick in that it at most amounted  
24 to a name change." Doc #49 at 5 ¶ 15. Plaintiffs have failed,  
25 however, to state what is false or misleading about the merger.  
26 Moreover, this allegation amounts to an argument that I2 Telecom  
27 defendants misrepresented the law of mergers to plaintiffs, which  
28 cannot state a claim for fraud. Miller, 358 F3d at 620.

1           Next, plaintiffs allege that "[a]fter numerous telephone  
2 discussions, Arena and Zalenski made [plaintiffs] believe that [I2  
3 Telecom] was a legitimate entity involved in startup financing of  
4 technology ventures." Doc #49 at 11 ¶ 39. This allegation fails  
5 at step one. Alleging a group of telephone calls without alleging  
6 their specific content does not qualify as a specific statement.  
7 Vess holds that the circumstances constituting the alleged fraud  
8 must be specific enough to give defendants notice of the particular  
9 misconduct. 317 F3d at 1106. Attorney defendants have, no doubt,  
10 made several phone calls to plaintiffs. Without more detail  
11 however, attorney defendants cannot know which call or calls, and  
12 what content within those calls, unlawfully caused plaintiffs to  
13 believe I2 Telecom was a legitimate entity. Moreover, there is  
14 nothing inherently misleading about the existence of a telephone  
15 call. Plaintiffs must plead something about the specific content  
16 of those calls that was misleading. They have not done so.

17           Next, plaintiffs allege that:

18           [a]s part of its deception, I2 [Telecom]  
19 sported a web site, which showed that it had  
20 offices, technology and engineers who were  
21 ready to provide VOIP services with the  
22 licensed Supercaller[] technology. At the time  
23 I2 [Telecom] advertised on its website that it  
24 was the exclusive worldwide licensee of  
25 Supercaller's technology, it had on its payroll  
no electrical engineer with VOIP experience.  
The entire representation by I2 [Telecom] was a  
consummate lie. \* \* \* These devices and labels  
were to deceive Supercaller and its employees  
into believing that I2 [Telecom] was a  
legitimate business.

26           Doc #49 at 11-12 ¶ 41.

27           The court is satisfied that plaintiffs have properly  
28 alleged why statements on the website were false or misleading.

1 But plaintiffs have not alleged when this website came into  
2 existence or when plaintiffs first viewed it. If the website was  
3 not created and posted online until after the material events  
4 alleged in the FAC occurred, then it has no relevance to this case.  
5 Accordingly, this allegation is also insufficient.

6  
7 b

8 Having found no allegations within the general body of  
9 the complaint satisfying Rule 9(b), the court turns to the second,  
10 third and eighth causes of action for allegations of specific  
11 fraudulent statements or omissions.

12 The second cause of action for fraud and deceit alleges  
13 several vague statements, without specifying the time, location and  
14 reason false. Accordingly, none of these allegations satisfies  
15 Rule 9(b).

16 Plaintiffs also allege fraudulent omissions. Id at 41 ¶  
17 97. First, plaintiffs allege that I2 Telecom defendants failed to  
18 tell plaintiffs that I2 Telecom was "a shell company with  
19 inadequate funds and when they offered to provide investment funds  
20 to Supercaller in the amount of \$1,300,000 in or about June 2002,  
21 they did not have the funds available to invest." Id. This  
22 allegation implies that I2 Telecom defendants previously stated  
23 that they did have \$1,300,000 in June 2002 available to invest.  
24 The FAC alleges that "Arena assured Lew Lim that he had money set  
25 aside to meet the investment obligation. But there was no money  
26 set aside." Id at 15 ¶ 56. "During negotiations leading to the  
27 signing of the [CSPA] dated June 6, 2002, Arena represented to Lew  
28 that he and I2 Telecom could write a check to cover the entire

1 escrow amount of \$1,000,000. But he and I2 Telecom never in fact  
2 had the capacity to so pay \* \* \*." Id at ¶ 57.

3 Moreover, the CSPA provided that "[I2 Phone] agrees to  
4 purchase [shares of Supercaller]. The aggregate purchase price of  
5 such shares shall be [\$1,300,000]." Doc #62, Ex A at 1. The  
6 agreement goes on to provide for four "closing" dates upon which I2  
7 Phone was to make installment payments to Supercaller. Id. On the  
8 first closing (on June 5, 2002, or such other time as the parties  
9 mutually agree upon) I2 Phone was to pay \$300,000 to Supercaller.  
10 Id at 1-2. On the second closing date (not to occur prior to July  
11 1, 2002), I2 Phone was to pay another \$300,000. Id at 2. On the  
12 third closing date (not to occur prior to August 1, 2002), I2 Phone  
13 was to pay \$500,000. Finally, on the fourth closing date (not to  
14 occur prior to October 1, 2002), I2 Phone was to pay the final  
15 \$200,000. Id at 2-3.

16 Plaintiffs' allegations come very close to meeting Rule  
17 9(b)'s heightened pleading requirements. Nonetheless, each  
18 allegation suffers from at least one defect. The first allegation  
19 (Arena's assurance that money was set aside to meet the investment  
20 obligation) adequately sets forth what was false or misleading  
21 about the alleged statement, who made it and to whom it was made.  
22 But it is unclear when or where the statement was made. It is true  
23 that plaintiffs allege other facts within the same paragraph  
24 occurring "on or about June 6th, 2002." Doc #49 at 15 ¶ 56. But  
25 it is not clear whether the alleged fraudulent statement contained  
26 in that paragraph was also allegedly made on June 6.

27 The next allegation (that Arena represented to Lim that  
28 I2 Telecom could write a check to cover the escrow amount of



1 \$1,000,000) adequately sets forth what was false or misleading  
2 about the statement (i e, that I2 Telecom defendants never had the  
3 money to write the check). Moreover, plaintiffs allege who made  
4 the statement and to whom it was made. Plaintiffs fail to allege  
5 when and where the statement was made. Instead, plaintiffs merely  
6 allege that the statement was made "during negotiations leading to  
7 the signing [of the CSPA]." Id at ¶ 57. The FAC fails to allege  
8 over what course of time those negotiations took place or at what  
9 point during those negotiations the fraudulent statement was made.  
10 For example, if the negotiations took place over a two-week period,  
11 plaintiffs should specify when during that period the alleged  
12 statement was made, and where plaintiff and defendant were at the  
13 time. Arena may have been involved in several discussions and  
14 negotiations with plaintiff. Plaintiff must therefore give Arena  
15 notice of when and where the alleged statement was made so that he  
16 may properly respond. Was it a conference call? Were the parties  
17 negotiating face-to-face? Was anyone else present? These are the  
18 kinds of allegations that will enable I2 Telecom defendants to do  
19 more than simply deny that they made the statements.

20 Furthermore, the CSPA has no bearing on whether the  
21 failure of I2 Telecom defendants to disclose that they were  
22 inadequately capitalized was a fraudulent statement. The CSPA does  
23 not represent that I2 Telecom defendants had the \$1,300,000 at the  
24 time they entered into the agreement. Rather, the CSPA provides  
25 that I2 Telecom defendants were to pay the money in installments  
26 over a course of several months. There is nothing inconsistent  
27 with that agreement and I2 Telecom defendant's failure to have all  
28 \$1,300,000 in funds at the time the CSPA was entered into.

1           Next, plaintiffs allege that I2 Telecom defendants  
2 omitted to tell plaintiffs that "I2 Telecom did not have any  
3 expertise in the VOIP technology or in the market for the  
4 technology." Id at 41 ¶ 97. The FAC alleges that "[i]n numerous  
5 conference calls in June-September 2002, Arena, Zalenski and I2  
6 Telecom promised to provide technical assistance with a backend  
7 server deployment, and development of carrier technology - carrier,  
8 protocols and regulatory requirements - for several  
9 telecommunication product markets. But this never happened because  
10 I2 Telecom never had any technological ability to perform on any of  
11 its promises." Id at 14 ¶ 50.

12           While this statement moves in the direction of satisfying  
13 Rule 9(b)'s pleading requirements by setting forth what was  
14 misleading about the statement, the complaint fails to set forth  
15 when and where the alleged statement or statements were made.  
16 Instead, the allegation in question covers a span of time from June  
17 through September, 2002. Moreover, plaintiffs must satisfy the  
18 heightened pleading requirements for each defendant. In re Worlds  
19 of Wonder Securities Litigation, 694 F Supp 1427, 1432 (N D Cal  
20 1988). Plaintiff must distinguish among those he sues and  
21 "enlighten each defendant as to his or her part in the alleged  
22 fraud." Id (citing Bruns v Ledbetter, 583 F Supp 1050, 1052 (S D  
23 Cal 1984). Plaintiffs' allegation does not sufficiently attribute  
24 specific conduct to individual defendants. Instead, plaintiffs  
25 have lumped "Arena, Zalenski and I2 Telecom" together and alleged  
26 that all three promised to provide technical expertise. For one  
27 thing, I2 Telecom, as a legal business entity, clearly is not  
28 capable of making statements except through an officer or agent,

1 whom plaintiffs do not adequately identify. Plaintiff's allegation  
2 is therefore over inclusive and must be refined with greater  
3 specificity as to who made what statements.

4 In sum, plaintiffs fail to allege any fraudulent  
5 statements or omissions in conformance with FRCP 9(b)'s heightened  
6 pleading standards. Accordingly, the second cause of action  
7 against I2 Telecom defendants is DISMISSED.

8 Plaintiffs' third and eighth causes of action for fraud,  
9 deceit and conspiracy, like the second, allege several vague  
10 statements, without specifying when the statement was made, where  
11 it was made or why it was false. Id at 43-46 ¶¶ 103-112, 151-161.  
12 Accordingly, the third and eighth causes of action against I2  
13 Telecom defendants are both DISMISSED.

14  
15 2

16 Next, I2 Telecom defendants argue that plaintiffs' tenth  
17 cause of action for breach of the duty of good faith and fair  
18 dealing should be dismissed for failure to satisfy Rule 9(b)'s  
19 requirements of particularity. Doc #60 at 8. Fraud is not an  
20 essential element of this cause of action. Because it is based on  
21 I2 Telecom defendants' alleged scheme to defraud plaintiffs, it is  
22 grounded in fraud. See Doc #37 at 24. Accordingly, the court  
23 reviews the tenth cause of action for specific allegations of  
24 fraud.

25 Plaintiffs allege two instances of fraudulent conduct by  
26 I2 Telecom defendants. First, plaintiffs allege that I2 Telecom  
27 defendants "ingratiated themselves in the good offices of  
28 [p]laintiffs with false representations that they would act in good

1 faith and according to accepted business norms." Doc #49 at 65 ¶  
2 169. This allegation fails to identify a specific misleading  
3 statement, when it was made or why it was misleading. Next,  
4 plaintiffs allege that I2 Telecom defendants "promised not to  
5 unfairly act with Supercaller and third party companies when [I2  
6 Telecom defendants] provided services of Supercaller and third  
7 party companies to their clients." Id at ¶ 171. This allegation  
8 suffers from the same defects as the first. Moreover, plaintiffs  
9 have not alleged that defendants had an intention to act unfairly  
10 when they made any such promise. Failure to fulfill a promise is  
11 not in itself fraudulent. Accordingly, the tenth cause of action  
12 is DISMISSED.

## 3

15 Relying in part on Rule 9(b), I2 Telecom defendants argue  
16 that plaintiffs' fourth and fifth causes of action for racketeering  
17 should be dismissed under Rule 12(b)(6). To state a claim under  
18 RICO, 18 USC § 1962(c), plaintiffs must allege: (1) the conduct;  
19 (2) of an enterprise; (3) through a pattern of (4) racketeering  
20 activity. Forsyth v Humana, Inc, 114 F3d 1467 (9th Cir 1997).

## a

23 First, I2 Telecom defendants allege that plaintiffs have  
24 not adequately alleged the existence of an "enterprise" separate  
25 from the pattern of racketeering activity in which defendants  
26 allegedly engaged. Doc #60 at 6. 18 USC § 1961(4) defines  
27 "enterprise" as including "any individual, partnership,  
28 corporation, association, or other legal entity, and any union or

1 group of individuals associated in fact although not a legal  
2 entity." At a minimum, to be an enterprise, an entity must exhibit  
3 some sort of structure for the making of decisions, whether it be  
4 hierarchical or consensual. Chang v Chen, 80 F3d 1293, 1299 (9th  
5 Cir 1996). The structure should provide some mechanism for  
6 controlling and directing the affairs of the group on an on-going,  
7 rather than an ad hoc, basis. Id.

8 Plaintiffs have alleged that I2 Telecom is a Delaware  
9 corporation, with defendant Arena serving as CEO, defendant  
10 Zalenski serving as president and defendant Kossar serving as  
11 chairman of the board. Doc #49 at 3 ¶ 4, 7 ¶ 24. These  
12 allegations show that I2 Telecom exhibited a hierarchical structure  
13 independent from the pattern of racketeering activity in which  
14 plaintiffs believe defendants have engaged. Accordingly, I2  
15 Telecom defendants' contention that plaintiffs fail adequately to  
16 allege an enterprise is without merit.

17  
18 b

19 Next, I2 Telecom defendants argue that plaintiffs have  
20 failed to plead the underlying criminal acts of racketeering  
21 activity with sufficient particularity under FRCP 9(b). Doc #60 at  
22 6-7. When a plaintiff alleges fraudulent acts as the predicate  
23 acts in a RICO claim, FRCP 9(b) requires that circumstances  
24 constituting fraud be stated with particularity. Pollack v Katz,  
25 42 F3d 1401 (9th Cir 1994). In Moore v Kayport Package Exp, Inc,  
26 885 F2d 531, 541 (9th Cir 1989), the plaintiff's third amended  
27 complaint alleged that: "Commencing on or about October, 1982, and  
28 through and including March, 1983, within the Central District of

1 California, and elsewhere, the defendants, and each of them,  
2 devised, intended to devise and carried out, a scheme to defraud \*  
3 \* \*." Id. The court found this allegation insufficient for  
4 several reasons. First, the complaint did not attribute specific  
5 conduct to individual defendants. Id. Moreover, the complaint did  
6 not sufficiently specify the time, place or content of the alleged  
7 fraud. Id.

8 In Pollack, plaintiff alleged that on a number of  
9 different dates defendant made fraudulent representations by mail,  
10 facsimile transmission and phone. Id. However, plaintiff did not  
11 describe the particular contents of the alleged letters, faxes and  
12 phone calls and the role they played in the fraudulent scheme. Id.  
13 Accordingly, the Ninth Circuit upheld the district court's  
14 dismissal of plaintiff's RICO claim. Id.

15 Similarly in this case, plaintiffs allege that "from  
16 February 2002 to the present, [I2 Telecom defendants] combined,  
17 conspired and agreed with other businesses \* \* \* to deceive and  
18 trick [p]laintiffs into entering into licensing, marketing and  
19 investing agreements with I2 Telecom \* \* \*." Doc #49 at 47 ¶ 116.  
20 Like the Moore complaint, the FAC here does not sufficiently  
21 attribute specific conduct to individual defendants. Nor does the  
22 FAC sufficiently specify the time, place or content of the alleged  
23 fraud. Moreover, the court has already found that the fraud  
24 allegations in the second and third causes of action are  
25 insufficient under 9(b). It remains, therefore, only to review the  
26 remainder of plaintiffs' fourth and fifth causes of action to  
27 determine whether plaintiffs have alleged any predicate acts of  
28 fraud with sufficient particularity.

1           Although plaintiffs have no doubt exhausted the thesaurus  
2 entries for the word "fraud," alleging that I2 Telecom defendants  
3 "deceive[d]," "trick[ed]," "defrauded," "conceal[ed],"  
4 "misrepresent[ed]" and "hoodwink[ed]" plaintiffs, the fourth and  
5 fifth causes of action do not identify a single misleading  
6 statement which satisfies Rule 9(b). Rather, these allegations  
7 repeat the refrain running throughout the FAC. For example,  
8 plaintiffs allege that I2 Telecom defendants have "employ[ed] a  
9 variety of practices desired to deceive and trick plaintiffs \* \*  
10 \*." Id at 52 ¶ 130. I2 Telecom defendants have "deceived  
11 plaintiffs into entering an agreement [by] utilizing a variety of  
12 practices and strategies designed to deceive \* \* \*." Id ¶ 131  
13 (emphasis added). I2 Telecom defendants have "deceptively made  
14 numerous telephone calls" and "[a]ctively conceal[ed] their true  
15 motive." Id at 53 ¶ 132(a) (emphasis added). Moreover, I2 Telecom  
16 defendants have "[c]aused, through deception, intimidation,  
17 trickery and fraud, plaintiffs to forego other legitimate  
18 investment opportunities \* \* \*." Id at ¶ 132(e). Because these  
19 vague allegations continue for several pages, the court declines to  
20 explain why each and every one fails to meet 9(b)'s heightened  
21 pleading standards. Suffice it to say that specificity is lacking  
22 throughout.

23           Plaintiffs have failed to allege predicate acts of  
24 racketeering activity with the specificity required by FRCP 9(b).  
25 Accordingly, the fourth and fifth causes of action under RICO are  
26 DISMISSED.

27 /

28 /

B

I2 Telecom defendants next argue that plaintiffs' ninth cause of action for interference with prospective economic advantage should be dismissed for failure to state a claim upon which relief can be granted. Doc #60 at 7. I2 Telecom defendants have not argued that the ninth cause of action lacks merit for failure to comply with FRCP 9(b). Consequently, the court reviews this cause of action under the substantially more permissive standard of FRCP 8. This standard is a liberal one that does not require plaintiff to set forth all the factual details of the claim; rather, all that the standard requires is that plaintiff give defendant fair notice of the claim and the grounds for making that claim. Leatherman v Tarrant County Narcotics Intell & Coord Unit, 507 US 163, 168 (1993) (citing Conley v Gibson, 355 US 41, 47 (1957)). To this end, plaintiffs' complaint should set forth "either direct or inferential allegations with respect to all the material elements of the claim." Wittstock v Van Sile, Inc, 330 F3d 899, 902 (6th Cir 2003).

Under Rule 12(b)(6), a complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Hughes v Rowe, 449 US 5, 10 (1980) (citing Haines v Kerner, 404 US 519, 520 (1972)); see also Conley, 355 US at 45-46. All material allegations in the complaint must be taken as true and construed in the light most favorable to plaintiff. See In re Silicon Graphics Inc Securities Litigation, 183 F3d 970, 980 n10 (9th Cir 1999).

The elements of a cause of action for interference with



1 prospective economic advantage in California are: (1) plaintiff  
2 had an economic relationship with a third party containing the  
3 probability of a future economic benefit to plaintiff; (2)  
4 defendant had knowledge of this relationship; (3) defendant  
5 committed intentional and wrongful acts designed to disrupt the  
6 relationship; (4) actual disruption of the relationship occurred;  
7 and (5) economic harm to plaintiff was proximately caused by  
8 defendant's conduct. Della Penna v Toyota Motor Sales, USA, Inc,  
9 11 Cal 4th 376, 389 (1995).

10 I2 Telecom defendants contend that plaintiffs have failed  
11 to allege facts establishing that Supercaller had an economic  
12 relationship with a third party containing future economic benefit.  
13 Doc #60 at 8. Moreover, I2 Telecom defendants argue that  
14 plaintiffs did not allege that defendants had any knowledge of an  
15 economic relationship with a third party.

16 Plaintiffs allege that Supercaller "forewent other  
17 opportunities to raise venture funding in reliance of the promise  
18 by [I2 Telecom defendants]. For example, Supercaller had  
19 attractive offers to purchase shares from the Whistler Group \* \* \*  
20 and Don Metzger \* \* \*, which were refused because [plaintiffs]  
21 relied on the promises of [I2 Telecom defendants.]" Doc #49 at 13  
22 ¶ 49. Consequently, the complaint satisfies the first element of  
23 interference with prospective economic advantage. But plaintiffs  
24 do not allege that I2 Telecom defendants had knowledge of those  
25 relationships or that plaintiffs ever attempted to make I2 Telecom  
26 defendants aware of those relationships. Nor do plaintiffs make  
27 allegations that could give rise to an inference that I2 Telecom  
28 was aware of those relationships. Accordingly, plaintiffs' ninth

1 cause of action is DISMISSED.

2  
3 C

4 Next, I2 Telecom defendants contend that plaintiffs'  
5 thirteenth cause of action for usurpation of corporate opportunity  
6 should be dismissed. Doc #60 at 9. The corporate opportunity  
7 doctrine prohibits a fiduciary from acquiring:

8 in opposition to the corporation, property in  
9 which the corporation has a vested interest or  
10 tangible expectancy \* \* \* [A] corporate  
11 opportunity exists when a proposed activity is  
12 reasonably incident to the corporation's  
13 present or prospective business and is one in  
14 which the corporation has the capacity to  
15 engage.

16 Robinson, Leatham & Nelson, Inc v Nelson, 109 F3d 1388 (9th Cir  
17 1997) .

18 Plaintiffs allege that if the court finds defendant Arena  
19 was a duly appointed member of the Supercaller Board of Directors,  
20 he owed Supercaller a duty not to usurp corporate opportunities for  
21 himself. Doc #49 at 68-69 ¶ 186. According to plaintiffs, I2  
22 Telecom defendants knew of an opportunity to market a Supercaller  
23 to Staples, Inc. Id at ¶ 187. But plaintiffs have merely alleged  
24 that I2 Telecom defendants "used that information to personally  
25 benefit." Plaintiffs have not alleged how defendants used the  
26 information to their benefit. Id. The complaint must do more than  
27 allege the elements of the cause of action in conclusory fashion.  
28 Accordingly, this cause of action is DISMISSED.

D

I2 Telecom defendants next argue that plaintiffs'

1 fifteenth cause of action for interference with attorney-client  
2 relationship should be dismissed. Doc #60 at 10. The elements of  
3 interference with attorney-client relationship mirror those of  
4 interference with contract. Abrams & Fox, Inc v Briney, 39 Cal App  
5 3d 604, 608 (1974). Plaintiffs must allege: (1) a valid contract  
6 between plaintiff and a third party, (2) defendants' knowledge of  
7 this contract, (3) that defendants' intentional acts were designed  
8 to induce a breach or disruption of the contractual relationship,  
9 (4) actual breach or disruption of the contractual relationship and  
10 (5) resulting damage. Pacific Gas & Electric Co v Bear Stearns &  
11 Co, 50 Cal 3d 1118, 1126 (1990). Plaintiffs' complaint should set  
12 forth "either direct or inferential allegations with respect to all  
13 material elements of the claim." Wittstock, 330 F3d at 902  
14 (emphasis added).

15           According to I2 Telecom defendants, plaintiffs fail to  
16 allege that a valid contract existed between plaintiff and Chaganti  
17 or that an actual breach of the contract occurred. Doc #60 at 10.  
18 However, plaintiffs do allege that "Supercaller hired [] Chaganti."  
19 Doc #49 at 71 ¶ 192. While plaintiffs do not spell out the fact in  
20 excruciating detail, the court finds that plaintiffs set forth  
21 allegations sufficient to support an inference that plaintiffs and  
22 Chaganti had a valid contract. Moreover, I2 Telecom defendants  
23 ignore that not only actual breach but also disruption of the  
24 contract satisfies the fourth element. Plaintiffs allege that  
25 Arena "pressured [] Lim not to pay Naren Chaganti for the services  
26 he rendered." Id at ¶ 193. Again, the court finds that plaintiffs  
27 have set forth allegations sufficient to support the inference that  
28 I2 Telecom defendants disrupted the contract between plaintiffs and

1 Chaganti. Accordingly, I2 Telecom defendants' motion to dismiss  
2 the fifteenth cause of action is DENIED.

3  
4 E

5 Next, I2 Telecom defendants contend that plaintiffs'  
6 eighteenth cause of action for infliction of emotional distress is  
7 barred by the statute of limitations. Doc #60 at 10. In 2002 the  
8 California Legislature amended section 340(3) of the California  
9 Code of Civil Procedure, deleting the one-year limitations period  
10 for personal injury actions, and adding section 335.1, which now  
11 provides a two-year statute of limitations for such actions.

12 Neither plaintiffs nor I2 Telecom defendants take notice  
13 of the extension of the statute of limitations. Citing a 1998  
14 case, I2 Telecom defendants allege that "[c]laims for intentional  
15 infliction of emotional distress must be brought within one year of  
16 the event alleged to have inflicted the distress." Doc #60 at 10.  
17 Plaintiffs clearly fail to notice this detail as well. While they  
18 correctly state that "defendants are \* \* \* wrong in asserting  
19 statute of limitations \* \* \* for [plaintiffs'] emotional distress  
20 claim," plaintiffs' explanation is wildly off target. Doc #96 at  
21 18. According to plaintiffs, the statute of limitations does not  
22 bar the cause of action for intentional infliction of emotional  
23 distress because "[n]othing in the complaint states that plaintiffs  
24 are barred by any limitations period." Id. But a determination  
25 that a claim is barred by the statute of limitations does not turn  
26 on whether plaintiffs have alleged in the complaint that they are  
27 barred by the statute of limitations from bringing their own claim.  
28 Neither party has provided the court with an accurate analysis of

1 the facts and governing law. Accordingly, I2 Telecom defendants'  
2 motion to dismiss the eighteenth cause of action is DENIED.

4 F

5 Finally, I2 Telecom defendants argue that plaintiffs'  
6 nineteenth cause of action for wrongful discharge in violation of  
7 public policy is precluded by a decision by the California  
8 Department of Industrial Relations. Doc #60 at 11. FRCP 12(b)  
9 provides that if, on a 12(b)(6) motion to dismiss:

10 matters outside the pleading are presented to  
11 and not excluded by the court, the motion shall  
12 be treated as one for summary judgment and  
13 disposed of as provided in Rule 56, and all  
14 parties shall be given reasonable opportunity  
15 to present material made pertinent to such a  
16 motion by Rule 56.

17 Plaintiffs have had reasonable opportunity to present  
18 material pertinent to the resolution of this issue in their  
19 opposition to defendants' motion. Instead, plaintiffs argue merely  
20 that this "issue should be saved for another day." Doc #96.  
21 Nonetheless, the court treats I2 Telecom defendants' motion as one  
22 for summary judgment.

23 In reviewing a summary judgment motion, the court must  
24 determine whether genuine issues of material fact exist, resolving  
25 any doubt in favor of the party opposing the motion. "[S]ummary  
26 judgment will not lie if the dispute about a material fact is  
27 'genuine,' that is, if the evidence is such that a reasonable jury  
28 could return a verdict for the nonmoving party." Anderson v  
Liberty Lobby, 477 US 242, 248 (1986). "Only disputes over facts  
that might affect the outcome of the suit under the governing law  
will properly preclude the entry of summary judgment." Id. And

1 the burden of establishing the absence of a genuine issue of  
2 material fact lies with the moving party. Celotex Corp v Catrett,  
3 477 US 317, 322-23 (1986). Summary judgment is granted only if the  
4 moving party is entitled to judgment as a matter of law. FRCP  
5 56(c).

6 The nonmoving party may not simply rely on the pleadings,  
7 however, but must produce significant probative evidence, by  
8 affidavit or as otherwise provided in FRCP 56, supporting its claim  
9 that a genuine issue of material fact exists. TW Elec Serv v  
10 Pacific Elec Contractors Assn, 809 F2d 626, 630 (9th Cir 1987).

11 The evidence presented by the nonmoving party "is to be believed,  
12 and all justifiable inferences are to be drawn in his favor."  
13 Anderson, 477 US at 255. "[T]he judge's function is not himself to  
14 weigh the evidence and determine the truth of the matter but to  
15 determine whether there is a genuine issue for trial." Id at 249.

16 Administrative proceedings may be given the preclusive  
17 effect accorded to a court when: (1) An administrative agency is  
18 acting in a judicial capacity and (2) resolves disputed issues of  
19 fact properly before it which the parties have had an adequate  
20 opportunity to litigate. United States v Utah Construction &  
21 Mining Co, 384 US 395, 422 (1966); Plaine v McCabe, 797 F2d 713  
22 (9th Cir 1986).

23 "There can be no indiscriminate presumption of judicial  
24 adequacy of state administrative proceedings." Id at 719.  
25 Consequently, the court must carefully review the state  
26 administrative proceeding to ensure that, at a minimum, it meets  
27 the state's own criteria necessary for a court of that state to  
28 give preclusive effect to the state agency's decisions. Id. "[A]

1 federal court should normally give preclusive effect to a state  
2 administrative decision when a state court would itself give that  
3 administrative decision preclusive effect \* \* \*." Id at 719 n13.

4 Neither party has provided the court with relevant  
5 authority on this issue. First, I2 Telecom defendants' recitation  
6 of the governing legal standards announced in Utah Construction &  
7 Mining Co and Plaine are but a shadow of the complex analysis the  
8 court must perform. These cases state the relevant question; it is  
9 up to I2 Telecom defendants to answer it. As stated above, the  
10 court must determine whether a California court would give the  
11 administrative decision preclusive effect. But I2 Telecom  
12 defendants offer no such argument. Instead, the court is told  
13 without so much as a citation to a statute or a case that the  
14 administrative agency is acting in a judicial capacity and resolved  
15 a dispute before it which the parties had adequate opportunity to  
16 litigate. Doc #60 at 11. As one example of I2 Telecom defendants'  
17 deficient argument, the court notes that neither federal nor  
18 California law gives preclusive effect to a state administrative  
19 proceeding not subject to judicial review. Wehrli v County of  
20 Orange, 175 F3d 692, 695 (9th Cir 1999). Yet defendants offer the  
21 court no guidance about whether decisions of the Department of  
22 Industrial Relations are subject to judicial review. Moreover,  
23 Utah Construction & Mining Co and Plaine dictate several additional  
24 considerations, but I2 Telecom defendants have submitted nothing to  
25 assist the court in that analysis.

26 Plaintiffs have fared no better in this argument,  
27 treating the court to a four sentence rebuttal instructing the  
28 court to save the issue for another day because the administrative

1 proceeding is a matter outside the complaint. This response is not  
2 sufficient; there is no reason why plaintiffs could not submit an  
3 adequate response to I2 Telecom defendants' contention.

4 The burden being on I2 Telecom defendants, the court must  
5 DENY their motion to dismiss the nineteenth cause of action.

6  
7 V

8 "[A] party may amend the party's pleading \* \* \* by leave  
9 of court \* \* \* and leave shall be freely given when justice so  
10 requires." FRCP 15(a). The Ninth Circuit directs district courts  
11 to apply the policy of Rule 15(a) with "extreme liberality."  
12 Morongo Band of Mission Indians v Rose, 893 F2d 1074, 1079 (9th Cir  
13 1990) (citing DCD Programs, Ltd v Leighton, 833 F2d 183, 186 (9th  
14 Cir 1987)). This liberality, however, is "subject to the  
15 qualification that amendment of the complaint [1] does not cause  
16 the opposing party undue prejudice, [2] is not sought in bad faith  
17 and [3] does not constitute an exercise in futility." DCD  
18 Programs, 833 F2d at 186 (internal citations omitted).

19 In view of the unfocused character of the first two  
20 complaints, the court has serious reservations about granting  
21 plaintiffs yet another opportunity to amend the complaint. But  
22 with hope overcoming experience, the court GRANTS plaintiffs'  
23 request for leave to amend the FAC. Plaintiffs are granted leave  
24 to amend their FAC to: (1) plead fraud against defendants with the  
25 requisite degree of particularity required by FRCP 9(b) and (2)  
26 replead any of the claims that do not require fraud as an essential  
27 element, if plaintiffs are able to assert a non-fraud basis for  
28 those claims. Plaintiffs are also admonished to heed the court's





## VII

In sum, the court: GRANTS attorney defendants' motion to dismiss (Doc #65), GRANTS IN PART I2 Telecom defendants' motion to dismiss (Doc #60) and DENIES plaintiffs' motion to file a surreply (Doc #105). The remaining causes of action against I2 Telecom defendants (or some subset thereof) are claims 1, 6, 7, 11, 12, 15-19, 21 and 22 in the FAC. Plaintiffs may if they so choose file an amended complaint by June 13, 2005, and defendants shall answer or otherwise plead on or before July 7, 2005. If plaintiffs do not file and amended complaint, the I2 Telecom defendants shall answer the FAC by June 27, 2005.

IT IS SO ORDERED.



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VAUGHN R WALKER  
United States District Judge